Supreme Court, U.S.
FILED
07-63 JUL 11 2007
OFFICE OF THE CLERK

No. ____

In the Supreme Court of the United States

JAMES LI

Petitioner,

v.

COUNTY OF LOS ANGELES,
MICHAEL JUDGE,
RONALD BROWN,
ADOLFO LARA,
WINSTON PETERS,
JOHN HILL

Respondents

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. What are the imports of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), a seminal employment discrimination case based on Title VII of Civil Rights Act of 1964, on employment discrimination cases based on 14th Amendment and 1st Amendment?

II. In the context of employment application, what constitutes an adverse employment action subject to constitutional scrutiny?

LIST OF PARTIES

PETITIONER

James Li

RESPONDENTS

County of Los Angeles
Michael Judge
Ronald Brown
Adolfo Lara
Winston Peters
John Hill

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals affirming granting respondents' motion for summary judgment (App., *infra,* 2a-5a) is unreported. The opinion of the district court (App., *infra*, 6a-11a) is unreported, which was incorporated in the order granting defendants' motion for summary judgment (App., *infra*, 12a-13a).

JURISDICTION

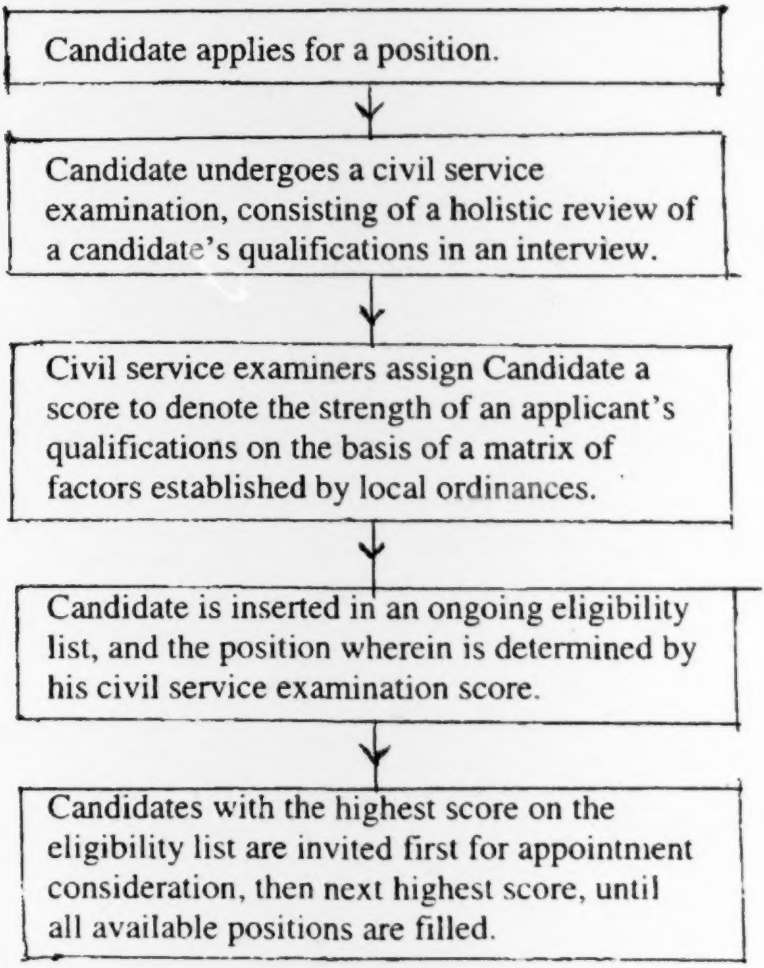
The court of appeals' judgment was entered on February 28, 2007. A timely petition for rehearing was denied on April 16, 2007 (App., *infra*, 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The 1st Amendment and 14th Amendment to the U.S. Constitution, 42 U.S.C. § 1983 and 42 U.S.C. § 1985(3).

STATEMENT

The plaintiff applied for a deputy public defender position in Los Angeles County in 1999. The hiring process in Los Angeles County Public Defender's Office is regulated by local civil service ordinance and is illustrated in the flowchart below.


Candidate applies for a position.
Candidate undergoes a civil service examination, consisting of a holistic review of a candidate's qualifications in an interview.
Civil service examiners assign Candidate a score to denote the strength of an applicant's qualifications on the basis of a matrix of factors established by local ordinances.
Candidate is inserted in an ongoing eligibility list, and the position wherein is determined by his civil service examination score.
Candidates with the highest score on the eligibility list are invited first for appointment consideration, then next highest score, until all available positions are filled.

The plaintiff took the civil examination, but was rated on a different standard and on a different rating matrix because defendant Brown, the Los Angeles County official in charge of the civil service examinations for deputy public defender positions, withheld information about the civil service examination's scope and scoring practice from the plaintiff's raters. Although the plaintiff's raters intended to place the plaintiff at the top of the eligibility list, as a result of defendant Brown's withholding critical information from them, the plaintiff's raters did not realize that the score they gave actually placed the plaintiff at the bottom of the eligibility list. The 9th Circuit acknowledged the evidence of the plaintiff's receiving different treatment from other applicants, as it acknowledged that "[The plaintiff] created a question of fact as to whether those who interviewed him had received precisely the same training as other interviewers." (App., *infra*, 3a:18-4a:2).

The plaintiff was never invited for further employment consideration by the official with appointing authority. The plaintiff sued defendants for subjecting his qualifications to a different standard of evaluation in the civil service examination for unlawful reasons, i.e., plaintiff's race and retaliation for past complaint of race discrimination against defendant Brown. The plaintiff set forth evidence that the treatment he received was different from applicants of other races and applicants who had not previously complained for past race discrimination against defendant Brown. The plaintiff contended the unlawfully motivated adverse action was defendant Brown's decision to withhold critical information about scoring matrix and practices from the plaintiff's raters, causing the plaintiff's qualifications be predictably under-rated, resulting in a civil service examination score that placed the plaintiff at the bottom of the eligibility list, even though the plaintiff's raters intended to place the plaintiff at the top of the eligibility list.

Defendant moved for summary judgment, citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), a case based on Title VII of Civil Rights Act of 1964, as authority supporting the proposition that under action based on 14th Amendment, the only relevant decision in a hiring process subject to constitutional scrutiny is the hiring decision of the official with appointing authority. Defendants contended that as the plaintiff was not high enough on the eligibility list to receive appointment consideration by the official with appointing authority, there was no issue of unlawful discriminatory intent in the appointing official's decision not to hire the plaintiff.

The Trial Court's Opinion.

The trial court granted defendants' motion for summary judgment to all defendants on all causes of action on the ground that it must follow *McDonnell Douglas Corp. v. Green* as the binding precedent and decide the case by

evaluating discriminatory issues on the act of hiring, notwithstanding evidence of the plaintiff being subjected to a different rating standard and the plaintiff's protestation that the adverse action the plaintiff challenges as unlawfully motivated is defendant Brown's withholding of critical information about the civil service examination from the plaintiff's raters.

The Court of Appeal's Decision.

Although acknowledging the existence of evidence of the plaintiff's receiving disparate treatment, the 9th Circuit panel affirmed the trial court decision on the ground that the outcome of Mr. Li's 14th Amendment clam is governed by VII cases, implicitly approving the trial court's use of *McDonnell Douglas* as the controlling precedent that the only action warranting constitutional scrutiny in a hiring process is the hiring decision. As the trial court, the 9th Circuit panel also decided the 1st Amendment retaliation

cause of action by evaluating motivation issue around the act of hiring in a hiring process.

REASONS FOR GRANTING THE PETITION

I. The Questions Presented Are Ones of National Interest.

Deciding the imports of *McDonald Douglas*, a case based on Title VII of Civil Right Act of 1964, on 1st Amendment and 14th Amendment cases is a matter of great national interest because the national interest in resolving issues arising from governmental practices impacting on 1st Amendment and 14th Amendment rights is compelling. Just in the last term alone, This Court decided whether it is lawful to use race in assigning students to public schools, *see Parents Involved In Community Schools v. Seattle School District No. 1 et al.* (October term, 2006), and scope of protected speech in advertisement and student activities, *see Federal Election Commission v. Wisconsin Right to Life, Inc.*

(October term, 2006) and *Morse et al. v. Frederick* (October term, 2006) respectively.

The sweeping commands of the 14th Amendment and 1st Amendment made applicable to the states by the 14th Amendment's Due Process clause are the backbones of civil rights in this country. As Title VII is a civil right statute arising from the 14th Amendment's enabling clause to serve the 14th Amendment's goal of equality, to what extent a Title VII case serves as a precedent for cases based on the 14th Amendment and 1st Amendment is a matter of great national interest because 14th Amendment and 1st Amendment's commands reach beyond the arena of employment and govern governmental conducts in every aspect of American life, from criminal prosecution to welfare relief.

McDonnell Douglas is a seminal Title VII case setting forth the order of proof on intentional discrimination cases where there is no direct evidence of discriminatory intent. The imports of *McDonnell Douglas* on 14th Amendment and 1st Amendment cases need be clarified

because while 14th Amendment, 1st Amendment and Title VII serve the common goals of equality and protection of speech in furtherance of equality, 14th Amendment and 1st Amendment's commands affect every aspect of American life, and This Court's guidance will prevent confusions that result in miscarriage of justice and misinterpreting the intents of the framers of the U.S. Constitution.

It is also in the national interest to clarify in the context of employment application, what constitutes an adverse employment action subject to Constitutional scrutiny. For most Americans, being employed is the single most important source of livelihood, and the kind of employment defines the quality of lives they and their children have. As a result, good jobs almost always attract far more applicants than there are openings, and involve a process of establishing a priority list, as the one in Los Angeles County Public Defender's Office, for employment consideration. Being placed on a low position on a long eligibility list is the functional equivalence of being rejected.

For most Americans, the promises of the civil rights laws are illusory if exercising those rights causes them to lose priority for employment consideration, or those rights have no application in the process of placing applicants on an eligibility list.

II. The Decision Below Is Incorrect.

The imports of *McDonnell Douglas* are (1) its recognition that it is very easy for employers to conceal discriminatory intent and (2) setting forth an indirect method of proving discriminatory intent in court. The fact that the act under legal scrutiny in *McDonnell Douglas* was the act of hiring has no legal significance because it was merely a piece of background information for the analytical framework frame work announced therein. 14th Amendment's commands have no qualification on the physical nature of action subject to its commands and apply to every act (e.g., "No state ... shall deny to any one within its jurisdiction the equal protection of the laws."). It is

simply plainly incorrect to interpret *McDonnell Douglas* as standing for the proposition that with regard to public employment hiring, the only action subject to the 14th Amendment and 1st Amendment's commands is the act of hiring, but not the actions or omissions preceding it in a hiring process consisting of a sequence of actions. Under such interpretation, the commands of the 14th Amendment and 1st Amendment will have no vitality because they can be circumvented by engaging in discrimination and retaliation in the prior stages of any multi-stage process. The lower courts also erred in its assumption that causing the plaintiff to be placed low on the eligibility list was not an adverse employment action because it is totally meaningless to be found employment-eligible if there is no prospect of being considered for appointment. In the context of this case, commissions or omissions that caused the plaintiff to be placed low on the eligibility list was the functional equivalent of rejection and was every bit as adverse as being rejected outright.

CONCLUSION

The petition for a writ of certiorari should be granted because this case presents an opportunity to clarify an issue of federal Constitutional civil rights law that affects practically every American in every aspect of American life.

Respectfully submitted.

July 10, 2007

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UNITED STATES COURTS OF APPEALS

FOR THE NINTH CIRCUIT

JAMES LI,	No.05-56833
Plaintiff – Appellant,	DC # CV-00-12724-RMT
v.	Central California
COUNTY OF LOS ANGELES, et. al.,	ORDER
Defendant - Appellees	

Before: BEEZER, FERNANDEZ, and McKEOWN, Circuit Judges.

The petition for panel rehearing is denied.

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CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES LI,	No.05-56833
Plaintiff – Appellant,	D.C. No. CV-00-12724-RMT
v.	
COUNTY OF LOS ANGELES, et. al.,	MEMORANDUM*[1]
Defendant - Appellees	

Appeal from the United States District Court
For the Central District of California
Robert M. Takasugi, District Court Judge, Presiding

Submitted February 20, 2007**[2]

Before: BEEZER, FERNANDEZ, and McKEOWN,

Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

James Li appeals pro se from the district court's summary judgment dismissing his action alleging discrimination and retaliation. We have jurisdiction under 28 U.S.C. § 1291. After de novo review, *Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1027 n.4 (9th Cir. 2006), we affirm.

The district court properly granted summary judgment on Li's discrimination claims because he did not raise a triable issue of fact as to whether the decision not to hire him was motivated by racial or ethnic discrimination or whether defendants' proffered explanation for not hiring him was actually a pretext for such discrimination. *See Cornwell*, 439 F.3d at 1028-29; *see also Lowe v. City of Monrovia*, 775 F.2d 998, 1010-11 (9th Cir. 1985)(applying Title VII burden-shifting framework to claims of intentional discrimination brought pursuant to the Fourteenth Amendment). At most, Li created a question of fact as to whether those who interviewed

him had received precisely the same training as other interviewers, and his theory that the interview process was manipulated so as to discriminate against him is based on unreasonable inferences. *See Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1065 n.10 (9th Cir. 2002)(at summary judgment, a court need not draw all possible inferences in plaintiff's favor, but only all reasonable ones, and a reasonable inference is one based on more than mere speculation, conjecture, or fantasy).

The district court also properly granted summary judgment on Li's retaliation claim because he failed to raise a triable issue of fact as to whether any protected expression was a substantial motivating factor in the decision not to hire him. *See Ulrich v. City and County of San Francisco,* 308 F.3d 968, 976 (9th Cir. 2002).

Li's remaining contentions lack merit.

AFFIRMED.

FILED
FEB 28 2007
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

JAMES LI,	)	
	)	
Plaintiff,	)	Case No. CV-00-1
	)	2724-RMT(Ex)
v.	)	
	)	
COUNTY OF LOS ANGELES, et. al.,	)	MEMORANDUM
	)	
	)	
Defendants	)	
_____	)	

This matter has come before the court on the motion of defendants County of Los Angeles, Michael Judge, Adolfo Lara, Robert Kalunian, Ronald Brown, Ronald White, Norman Koplof, Winston Peters, John Hill, and John Martinez for summary judgment or, alternatively, for an order specifying the facts that appear without substantial controversy. Having considered the pleading and other papers filed herein the court issues this

memorandum in lieu of findings of fact and conclusions of law.

Plaintiff James Li brings this action alleging that defendants have discriminated against him based on race and ethnicity and retaliated against him for his "speaking out" including his filing of prior civil rights lawsuits against the Los Angeles County Public Defender's Office in violation of his right under 42 U.S.C. §§ 1983, 1985(3) of the Civil Rights Act and the Fourteenth Amendment of the United States by failing to hire plaintiff.

Absent direct evidence of discrimination, a prima facie case under 42 U.S.C. § 1983 requires proof that (1) plaintiff is a member of a protected class, (2) qualified for the position, (3) but not selected for the position and (4) that the position remained open and was ultimately filled by one who is not a member of the protected class. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

Once a prima facie case is established a presumption of discrimination arises, which defendants can rebut by setting forth evidence of a legitimate nondiscriminatory reason for the adverse employment action. Thereupon it is plaintiff's burden to demonstrate that the nondiscriminatory reason is a pretext for discrimination. Defendants contend that, assuming plaintiff could establish a prima facie case, they can rebut the presumption of discrimination with evidence of a legitimate non-discriminatory reason for not hiring plaintiff. Defendants' asserted reason for not hiring plaintiff is that his performance on the Civil Service Examination ("CSE") did not place him in a high enough band to render him eligible for consideration.

Plaintiff alleges that he, a male of East Asian parentage, applied for an entry level public defender position with the Los Angeles County Office of the Public Defender and participated in the CSE

interview on October 27, 1999. Plaintiff was interviewed by defendants Winston Peters and John Martinez. Both Martinez and Peters gave plaintiff a score of 85, out of a possible 100 points. The score of 85 placed plaintiff in Band Three of the eligible register.[1]

Pursuant to Civil Service Rules, when Chief Public Defender, defendant Michael Judge, selects an individual to fill a vacancy, he is permitted to only consider those applicants in the highest ranking band having at least five persons, or in any other higher band.

In 1999, 235 applicants participated in the CSE interview for the entry level public defender attorney position, including 133 (56.5%) White applicants, 20 (8.5%) Black applicants, 35 (14.9%)

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[1] Pursuant to Civil Service Rule 11.01(C), the eligible register is a list of qualified prospects organized according to the following bands: (1) Band One ranges from 94.5 to 100; (2) Band Two ranges from 88.5 to 94.4, (3) Band Three ranges from 82.5 to 88.4 and (4) Band Four ranges from 76.5 to 82.4.

Hispanic applicants and 40 (17%) Asian-Pacific Islander applicants. Of the 235 applicants, 178 scored higher than 85; no applicant scored in Band One, 164 applicants scored in Band Two and 14 applicants scored higher than plaintiff in Band Three. Additionally, of these 178 applicants, 58% were White, 7% were Black, 16% were Hispanic, and 17% were Asian-Pacific Islander. During 1999, defendant Judge selected a total of twenty-seven applicants to fill entry level positions: eight (29.6%) Whites, four (14.8%) Blacks, four (18.5%) Hispanics, and ten (37%) Asian-Pacific Islanders. Because plaintiff placed in Band Three, he was not even eligible for consideration by defendant Judge.

Defendants have provided evidence to establish the above facts, which evidence has not been controverted by plaintiff. Plaintiff has failed to provide any evidence that defendants' asserted reason for not hiring plaintiff is a pretext for discrimination

or that defendant's actions were in retaliation for plaintiff's having "spoken out" against the Los Angeles County Public Defender's Office.[2] As such, summary judgment is warranted.

Dated: March 10, 2005

/s/ Robert M. Takasugi
ROBERT M. TAKASUGI
United States District Sr. Judge

FILED
MAR 10 2005

[2] Defendants have raised several objections to plaintiff's evidence, which the court declines to reach because even considering the evidence plaintiff presents, he fails to controvert defendants' asserted justification for not hiring him, that asserted justification being plaintiff's failure to place high enough on the CSE to render him eligible for consideration. Plaintiff presents no evidence relevant to show that the asserted justification is a falsehood or a cover up for discrimination.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

JAMES LI,	)	
	)	
Plaintiff,	)	Case No. CV-00-1
	)	2724-RMT(Ex)
v.	)	
	)	
COUNTY OF LOS ANGELES, MICHAEL JUDGE, et. al.,	)	ORDER GRANTING SUMMARY JUDGMENT
	)	
Defendants	)	
	)	

This matter having come before the court on the motion by defendants County of Los Angeles, Michael Judge, Adolfo Lara, Robert Kalunian, Ronald Brown, Ronald White, Norman Koplof, Winston Peters, John Hill and John Martinez for summary judgment or, alternatively, for an order specifying the facts that appear without substantial

controversy, and this court having issued a memorandum concurrently herewith.

IT IS ORDERED that the motion by defendants for summary judgment is granted. Judgment shall issue forthwith.

Dated: March 10, 2005

/s/ Robert M. Takasugi
ROBERT M. TAKASUGI
United States District Sr. Judge

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MAR 10 2005